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REPORT TO BUDGET AND FINANCE COMMITTEE

LEGAL ANALYSIS OF THE POTENTIAL SALE OF CITY AIRPORT PROPERTY

INTRODUCTION

At the November 10, 2010, meeting of the Budget and Finance Committee (Committee), the Committee requested information concerning the City's ability to sell the properties known as Brown Field Airport and Montgomery Field Airport. This Report will respond to that request.

BACKGROUND

A. Brown Field Airport.

By Quitclaim Deed (Brown Field Deed) dated September 1, 1962, the United States of America, acting by and through the Administrator of General Services, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Property Act of 1949, 63 Stat. 377 (1949), as amended, and the Surplus Property Act of 1944, as amended thereby, transferred the property now known as Brown Field Airport to the City, subject to the restrictions contained in the Brown Field Deed. The City accepted the Brown Field Deed pursuant to Resolution No. R-173066 on October 16, 1962. Relevant provisions of the Brown Field Deed include:

- a. the term "airport" is defined to include all of such land, buildings, structures, improvements, and equipment conveyed to the City;
- b. it is provided that the entire landing area and all structures, improvements, facilities and equipment transferred by the Brown Field Deed shall be maintained for the use and benefit of the public at all times and that such maintenance shall be required as to the structures, improvements, facilities, and equipment only for the remainder of their estimated life, as determined by the Administrator of the Federal Aviation Agency (now the Federation Aviation Administration (FAA));

- c. the property conveyed can be transferred by the City only with the approval of the Administrator of the FAA, or his successors, and only with the proviso that any such subsequent transferee assumes all the obligations imposed upon the City; and
- d. the property transferred by the Brown Field Deed cannot be used, leased, sold, salvaged, or disposed of by the City for other than airport purposes without the written consent of the Administrator of the FAA, after a determination by the Administrator that the property can be used, leased, sold, salvaged, or disposed of for other than airport purposes without materially and adversely affecting the development, improvement, operation or maintenance of the Airport.

Brown Field Deed at 5-7.

B. Montgomery Field Airport.

The City acquired Montgomery Field Airport (originally known as Gibbs Field) in 1947. The City purchased additional land in 1948 and again in the 1960s for airport purposes. The City accepted and utilized federal grant funds for each of the property acquisitions. Upon acceptance of grant funds for each acquisition, the City signed a grant agreement which contained a condition that stated: "There shall be no limit on the duration of the terms, conditions, and assurances with respect to real property acquired with federal funds." By agreeing to the condition that there is "no duration" to the terms, conditions, and assurances for such acquisitions, the City's contractual obligation to maintain and use the property for airport purposes is indefinite.

SUMMARY

Whether or not the City can sell Brown Field Airport, or Montgomery Field Airport, or both, depends upon the discretion and approval of the FAA and the Federal Secretary of Transportation. To a large extent, the ultimate decision would be specifically dependent upon whether: (1) the City's intent is to sell the airport(s) with the contingency that the airport(s) continue to be utilized as airport(s) for aviation purposes; or (2) the City's intent is to allow a purchaser(s) to close the airport(s) or allow a reduction(s) in aviation uses/purposes from the existing airports. However, whether the City's intent is to keep the airport(s) open or to close one or both of them, any such action(s) would require federal approval.

If the intent is to sell the airport(s) with the contingency that the airport(s) remain open, the City could make application with the FAA for the Airports Privatization Pilot Program (Privatization Program). This Privatization Program is designed to assist public agency sponsors with the selling or leasing of airports intended to remain open. (A public agency with control of a public-use airport is considered a "public agency sponsor"). Based on available information, the Privatization Program's process appears to be lengthy and would most likely be costly. Further, the Act which established the Privatization Program permits only up to five public

airport sponsors to be part of the Privatization Program. Since the Privatization Program's inception in 1997, only one airport was privatized, and that airport has since returned to public agency sponsorship. As of October 15, 2010, only four airports remain active in the application process.

The City would likely face significant hurdles from the FAA were it to consider closure or reduction of use/purpose of the airport(s). Based on past decisions, unless a public agency sponsor has found a new airport site, or there has been a determination by the FAA that all or a portion of an airport is no longer needed for airport purposes, the FAA has not approved the release of airport land from its contractual obligations, nor has the FAA allowed the sale of an airport or a portion of an airport.

As the City has previously accepted, and continues to accept, federal grant funds on behalf of the City's Airport Division, both of the City's airports are federally-obligated airports under the terms of the federal grant agreements (the Assurances). And, unless otherwise authorized, as a federally-obligated public airport sponsor the City is statutorily required to make both Brown Field and Montgomery Field Airports available as airports, for public use, on reasonable terms without unjust discrimination to all types, kinds, and classes of aeronautical activities. Failure to comply with the Assurances could result in the City having to repay all federal grant funds previously received by the City's Airport Division, which would subject the General Fund to potential liability for the debt if the Airport Enterprise Fund did not have sufficient funds to cover the repayment.

Any reduction of the size of the airports or sale of the airports with the intent to close the airports may subject the City to litigation from airport users and tenants currently under long-term leases with the City.

ANALYSIS

I. FEDERAL ASSURANCES AND REGULATIONS

The Assurances speak to proposed airport closings, deactivations, and reuse for non-aviation purposes. Specifically, Assurance C.5.b. states that the airport sponsor may not "sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property . . . for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary [of Transportation]." FAA Airport Compliance Manual, Order 5190.6B (Sept. 30, 2009) expands on this requirement, stating that "[a]ll land described in a project application and shown on an Exhibit 'A' constitutes the airport property obligated for compliance under the terms and covenants of a grant agreement." *Id.* at p. 22-10. Accordingly, an airport sponsor is obligated to obtain FAA consent to delete any land covered by the grant agreements. FAA consent shall be granted only if it is determined that the property is not needed for present or foreseeable public airport purposes. *Id.* If an airport sponsor's airport deactivation planning includes the sale, lease, encumbrance, or other transfer or disposition of its interests in

the federally-obligated property, it must first obtain approval from the Secretary by establishing that the land to be alienated is no longer “needed” for public airport purposes.

An airport sponsor is also obligated to “suitably operate and maintain the airport and all facilities . . . [The Sponsor] will not cause or permit any activity or action thereon which would interfere with its use for airport purposes.” Assurance C.19.a. This obligation to maintain the airport(s) includes the responsibility to operate the aeronautical facilities and common use areas for the benefit of the public, FAA Order 5190.6B, at p. 2-14. Therefore, the airport sponsor “is more than a passive landlord” of specialized real estate, and has a continuing obligation to operate and maintain the airport facilities. *Id.* at p. 7-6. For this reason, an airport sponsor may not cease to operate the airport prior to obtaining a release of its Assurances from the FAA.

“For land purchased under a grant for airport development purposes (other than noise compatibility), [the airport sponsor] will, when the land is no longer needed for airport purposes, dispose of such land at fair market value or make available to the Secretary [of Transportation] an amount equal to the United States’ proportionate share of the fair market value of the land.” Assurance C. 31.b. The United States’ share of the proceeds will either be reinvested in the national airport system or be deposited in the Aviation Trust Fund. Accordingly, an airport sponsor must either dispose of the land obtained with federal grant funds at fair market value, paying a proportionate share to the Secretary, or make that proportionate share available to the United States without disposing of the property. Therefore, whether an airport sponsor chooses to dispose of the property purchased with federal funds, maintain it for a public purpose other than aviation, or use it for non-public purposes, the airport sponsor must repay a proportionate share of the current fair market value of the land to the federal government. However, there is no limit on the duration of the terms, conditions, and assurances regarding real property acquired with federal funds. Assurance B.1 and FAA Order 5190.6B at p. 2-14.

Federal regulations distinguish between the treatment of grants for the purchase of real property and those for airport development or improvement purposes. With respect to facilities developed or equipment obtained with federal funds, the Assurances remain in effect for the useful life of the facilities developed or equipment acquired (Assurance B.1 and FAA Order 5190.6B at p. 2-13), although this period may not exceed twenty years from the date the grant offer was accepted. *Id.*

Despite the seemingly unequivocal requirements of the Assurances, the FAA has established procedures that allow the release, modification, reformation, or amendment of airport agreements, including grant agreements, under certain prescribed circumstances. Specifically, “[w]ithin the specific authority conferred upon the FAA Administrator by law, the Administrator will, when requested, consider a release, modification, reform, or amendment of any airport agreement to the extent that such action has the potential to protect, advance, or benefit the public interest in civil aviation.” FAA Order 5190.6B, §22.4(a). The FAA may grant relief from specific limitations or covenants of an agreement, or grant a complete and total release which authorizes the subsequent disposal of obligated airport property. *Id.* The FAA’s release may

apply to specific facilities and parcels of land acquired with federal assistance, which ultimately results in a partial airport closure, or disposal of an entire airport.

In order to release, modify, reform, or amend airport agreements, including grant agreements, the FAA must make at least one of several policy determinations. The determinations potentially applicable here include that: (1) the public purpose which a term, condition, or covenant of an agreement, or the agreement itself, was intended to serve is no longer applicable; or (2) the release, modification, reformation, or amendment of an applicable agreement will not prevent accomplishment of the public purposes for which the airport or its facilities were obligated, and such action is necessary to protect or advance the interest of the United States in civil aviation; or (3) the release, modification, reformation, or amendment will federally obligate the sponsor under new terms, conditions, covenants, reservations, or restrictions determined necessary in the public interest and to advance the interests of the United States in civil aviation; or (4) the release, modification, reformation, or amendment will conform the rights and obligations of the owner to the statutes of the United States and the intent of Congress consistent with applicable law. FAA Order 5190.6B, §22.28.

II. FAA PRIVATIZATION PROGRAM

The FAA Privatization Program assists a public agency sponsor in selling or divesting itself from its airport(s). The Privatization Program allows the transfer of airports to private organizations for continued airport purposes. The Act which established the Privatization Program permits up to only five public airport sponsors to sell or lease an airport and also exempts the sponsor from certain federal requirements that could make privatization impractical. Through these exemptions, a public agency sponsor would not be required to repay federal grants, return/relinquish property acquired with federal assistance, or use all proceeds from an airport's sale or lease exclusively for airport purposes. However, since the Privatization Program's inception in 1997, only one airport (Stewart Airport, located in New York State) has completed the privatization process. And, after six years of being privatized, that airport returned to public agency sponsorship when the local Airport Authority bought out the lease granted to the private entity during the privatization process.

Currently, four of the five slots available for the Privatization Program are taken. Since the Privatization Program's inception, ten airports have submitted applications. Of those ten, one airport (Stewart International Airport) finalized (but later left) the Privatization Program, and five airports have terminated or withdrawn their applications.

When considering the potential privatization of only one City airport, it is important to note that revenues from Montgomery Field are currently used to subsidize operations at Brown Field. Accordingly, the City would need to consider the possibility of other funding sources being used to subsidize Brown Field if its economic situation remained the same and Montgomery Field alone was privatized.

III. THE BROWN FIELD DEED REQUIRES THE PROPERTY TO REMAIN AS AN AIRPORT

As stated above, the City received the Brown Field property from the federal government under the Surplus Property Act pursuant to the Brown Field Deed which contained very specific use restrictions. The Brown Field Deed specifically set forth that “the entire landing area, as defined in GSA Regulation 2-I-102.01a.10, and all structures, improvements, facilities and equipment in which this instrument transfers any interest shall be maintained for the use and benefit of the public” Brown Field Deed at 5. This provision conveys the intent that the entire airport be maintained for continued airport use. Further, by setting forth in the Brown Field Deed that the City could only transfer the property “with the proviso that any such subsequent transferee assumes all the obligations imposed upon the [City],” (*id.* at 6-7) the FAA has clearly established that any conveyance of the property or any portion of it for any use other than aviation would not be allowed without an express finding from the FAA that such use was in the best interest of the national airport system. Accordingly, unless otherwise authorized, the City is obligated under the Brown Field Deed to use Brown Field for airport purposes in perpetuity.

In fact, in a letter dated March 29, 2005, responding to the City’s request to downsize or close Brown Field, the FAA informed the City that, as a result of the contractual obligations found in the Brown Deed and the Assurances: “the City may not close the airport without FAA approval and a formal release from the contractual obligations that require the City to operate a public airport. For much the same reasons, the City may not downsize the airport if it unreasonably denies access or limits the utility of the airport to civil aviation and the military.” The FAA went on to also state:

Realistically, the FAA has rarely considered an application for a release from all federal obligations to permit the closure of an airport. Usually, an airport closure is associated with planning for a replacement of an airport using the same criteria. With approximately 126-based aircraft and over 105,000 operations annually, some of them military, SDM [the FAA identifier for Brown Field Airport] is an important reliever airport. SDM plays an important role in civil aviation by serving as an air link to the local area, the State of California, the United States, and Mexico. SDM serves the public interest by facilitating air transportation, stimulating commerce and providing for the national defense. The federal investment and the City’s ongoing support of airport development demonstrate that SDM continues to play an important role in the national airspace system.

The FAA closed the letter with: "It is unlikely that the FAA could support the closure or downsizing of such a useful airport."

**IV. MONTGOMERY FIELD IS REQUIRED TO REMAIN AS AN AIRPORT
BECAUSE ITS LAND WAS PURCHASED WITH FEDERAL FUNDS**

As federal funds were used to purchase the real property now known as Montgomery Field Airport, the Assurances require that there shall be no limit on the duration of the term, conditions, and assurances with respect to real property acquired with federal funds. Accordingly, unless otherwise authorized, the City is obligated under the Assurances to use Montgomery Field for airport purposes in perpetuity.

**V. BOTH AIRPORTS HAVE ACCEPTED FEDERAL FUNDS FOR AIRPORT
IMPROVEMENTS**

Airport improvements such as runways, taxiways, electrical upgrades, fencing, and other facilities have been made possible at both Brown Field and Montgomery Field through the use of Federal grant funds. Accordingly, the Assurances apply for the useful life of each grant-funded improvement project, not to exceed twenty years from the date of each grant acceptance.

**VI. BOTH AIRPORTS ARE AN INTEGRAL PART OF THE NATIONAL AND
LOCAL AIRPORT SYSTEMS**

The National Plan of Integrated Airport Systems is an inventory of the U.S. aviation infrastructure assets. This Plan was developed and is maintained by the FAA with the purpose of preserving, improving, and continuing the development of the national airport system, and to ensure the continued, safe, and efficient service of the nation's commercial and general aviation needs. FAA Order 5090.3C.

Brown Field and Montgomery Field Airports are both general aviation airports; it is generally accepted that space for general aviation is at a premium at airports in San Diego County. Therefore, the sale of busy general aviation airports like either Brown Field or Montgomery Field, or any portion thereof, would be closely scrutinized by the FAA to ensure that no action would be taken that would hinder the advancement of the civil aviation interests of the United States.

In 2004, the Brown Field Airport ranked as the 216th busiest of the 492 airports in the nation with an operating traffic control tower. Additionally, Brown Field Airport is historically and currently ranked sixth out of the twelve busiest public-use airports in San Diego County for takeoffs and landings. Brown Field Airport is an International Port of Entry serviced by the United States Customs Service. The Secretary of Transportation may only waive the condition of a Surplus Property Act land transfer (like that which gave the Brown Field Airport to the City) if the Secretary decides: (a) that "the property no longer serves the purpose for which it was given"; or (b) that "the waiver will not prevent carrying out the purpose for which the conveyance was made and is necessary to advance the civil aviation interests of the United

States.” 49 U.S.C. §47153(a)(1). In FAA Interpretive Order 5190.6A (Oct. 1, 1989), titled “Airport Compliance Requirements,” the FAA states that “[a] total release, permitting the sale and disposal of real property acquired for airport purposes under the Surplus Property Act, shall not be granted unless it can clearly be shown that the sale of such property will benefit civil aviation.” *Id.* §7.8(a). The Order provides that the FAA’s general policy regarding the release of surplus property allows property to “be released for sale or disposal upon a demonstration that such disposal will produce an equal or greater benefit (to the airport or another public airport) than the continued retention of the land.” *Id.* §7.8(a)(1). The Order also states that an airport owner requesting a release must justify the request, and could do so by “showing that the expected net proceeds from the sale of the property at its current market value will be required to finance items of airport development and improvement.” *Id.* §7.8(c)(1). Both Brown Field and Montgomery Field Airports are reliever airports for San Diego’s International Airport. Montgomery Field Airport is listed as the eleventh busiest general aviation airport in the nation as of 2008; and historically Brown Field Airport has been listed as the sixth and Montgomery Field Airport as the first busiest airports in San Diego County. Therefore, it may be difficult for City officials to persuade the FAA that the sale of either airport would benefit civil aviation.

VII. THE FAA MAY ALLOW CLOSURE OF AN AIRPORT IN EXTREMELY LIMITED CIRCUMSTANCES

With the appropriate federal approvals, it may be possible to close a federally-obligated airport. However, such an action is usually only accomplished by first locating a new site, then building a new airport and moving all the aviation activities to the new airport prior to closing the old airport. The City of Denver, Colorado, because it opened a new airport, is one of the few cities in recent years allowed to close an airport.

That said, within statutory limits, the FAA, if requested, may be persuaded to act to release or amend any airport agreement to the extent that such action will protect, advance, or benefit the public interest in civil aviation. The case of *Friends of Richards-Gebaur Airport v. Fed. Aviation Admin.*, 251 F.3d 1178 (8th Cir. 2001), sets forth a situation where the FAA allowed an airport closure under very strict conditions. In 1998, the City of Kansas City, Missouri, sought permission to close the Richards-Gebaur Airport because it had consistently lost money. Between 1983 and 1997, losses exceeded \$18 million and were subsidized by the City’s two commercial airports. The airport’s losses were projected to continue at more than \$1.5 million annually. In 1997, in an effort to pursue an opportunity to redevelop the land into a new intermodal rail-truck freight distribution center, Kansas City sought permission to close the airport. *Id.* at 1183. In approving the closure, the FAA’s memorandum agreement stated that “the FAA found that although the facility was maintaining operation as a general aviation airport, it was able to do so only at substantial losses which were heavily subsidized by Kansas City’s other commercial airports, draining funds otherwise available to those facilities. The FAA found that this financial burden was not necessary in a metropolitan area served by several other airports that remain available to general aviation.” *Id.* The FAA concluded that the terms it attached to the release and closure of the airport would result in a net benefit to aviation. *Id.* The FAA required Kansas City to deposit \$5 million into an escrow account to be dispersed by

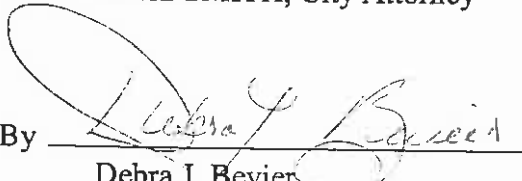
the FAA for federally eligible aviation improvement projects in the Kansas City area and, for the next twenty years, to deposit all the net proceeds from the projected lease (of the property which used to be the airport) into its aviation account for use solely for specified and general aviation projects. *Id.* at 1183-84. Accordingly, even though Kansas City closed the Richards-Gebaur Airport, the revenue produced by redevelopment of the airport property could only be utilized to advance aviation development in the Kansas City airport system. Specifically, the FAA found that "highly unusual circumstances exist that would support a finding that the release and closure of the Richards-Gebaur Airport would result in a net benefit to aviation . . ." *Id.* at 1193 (citation omitted).

Closer to home, the City of Bakersfield, California, petitioned the FAA to release the City from its obligations because the airport was not self-sustaining and, as a result, the City was forced to support the airport with City's funds. Although the airport was not self-sustaining, the FAA denied Bakersfield's petition.

CONCLUSION

Without prior federal approval, any attempt to sell or close one or both of the City's airports would be in violation of the terms and conditions contained in the original transferring Brown Field Deed and of the Assurances. The FAA may allow an airport to be closed in very limited circumstances. Until any such authority is granted by the federal government, the City must continue its compliance with all laws, regulations and Assurances, which includes making Brown Field and Montgomery Field Airports available as public use airports, on reasonable terms without unjust discrimination to all types, kinds, and classes of aeronautical activities. Further, in the event of a sale or reduction of use that affects the property or use of either airport, the City may be subject to lawsuits by airport users and long-term leaseholders.

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